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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

GEORGE ATEEQ,
Petitioner,

vs.

ELIA NAJOR, RANGER INSURANCE COMPANY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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I. INTRODUCTION

By hyperbole and ignoring the merits of Petitioner George Ateeq's ("Ateeq") Petition for Writ of Certiorari, Respondent Ranger Insurance Company ("Ranger") in its Brief in Opposition[1] overlooks the question of whether a non-Article III bankruptcy judge can constitutionally hear and determine a "non-core, related to" proceeding to cancel a bond filed in a state court action pursuant to state law, without the express consent of the parties as required by the Federal Rules of Bankruptcy Procedure. In fact, Ranger does not once mention Bankruptcy Rules 7008 and 7012 which mandate that express consent be given before a bankruptcy judge can hear and determine a "non-core, related to" matter.

Instead, Ranger seeks to misdirect the focus of this Court by mischaracterizing and distorting Ateeq's arguments or raising irrelevant issues, never determined by the Ninth Circuit, such as whether "core" jurisdiction existed to cancel the bond.[2] Had the Ninth Circuit believed that core jurisdiction existed over the bond cancellation issue, it could have easily said so. However, recognizing that core jurisdiction did not exist over the issue of cancellation of the bond, the Ninth Circuit was forced to engage in its "non-core,

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[1] The Brief in Opposition is cited as "Opp. __." The Appendices to the Opposition are cited as "Opp. App. __." The Petition for Writ of Certiorari is cited as "Pet. __." The Appendices to the Petition are cited as "Pet. App. __."

[2] The fact that ATEEQ may not address each and every argument or contention asserted by RANGER in its Brief in Opposition should not be construed to mean that there is any merit to those arguments or contentions. Rather, ATEEQ has no desire to assist RANGER in diverting the Court's attention from the real question presented.

related to" analysis, which analysis neglects to address the express consent requirement.

Ranger makes three arguments why this petition should be denied. Only one of the arguments is even remotely relevant to the question presented, and none of the arguments supports denial of the petition. Granting Ateeq's petition will allow this Court the opportunity to address the express consent requirement and provide future guidance as to the constitutionality of "non-core, related to" jurisdiction. Accordingly, this Court should grant the Petition for Writ of Certiorari.

II. ARGUMENT

A. The Notice Of Motion And Motion For Turnover Do Not Give Notice That Ranger Would Be Released From Liability.

Ranger's first argument for denial of the petition is the erroneous contention that "Ateeq inaccurately claims that he had no prior notice that Najor sought bond exoneration." (Opp. 15.) Ranger even goes so far as to suggest that this Court's Rules compel denial of the petition because Ateeq has failed to "present with accuracy" his position. Yet it is Ranger that is misleading this Court. Ateeq has *never* argued that the request to *cancel the bond* was not noticed.

Debtor Elia Najor's ("Najor") Notice of Motion only states that he was seeking a "turnover of the collateral supporting the undertaking obtained by NAJOR ... and ... cancellation of the undertaking." (Opp. App. A-2.) Ranger's citation to the record reinforces Ateeq's contention that the release of liability was not noticed. While the Notice does discuss cancellation of the bond, it *does not* discuss a release

of all liability after cancellation of the bond.

By intentionally using the term "bond exoneration" instead of "bond cancellation," as actually ordered by the bankruptcy court, Ranger is ignoring the clear provisions of California law which expressly state that "cancellation" of a bond does not automatically result in a release of liability. Instead, the bond "remains in full force and effect" for certain liabilities incurred before, and for acts, omissions, or causes existing or which arose before, the cancellation. Moreover, legal proceedings may be had therefor in all respects "as though there had been no cancellation." (California Code of Civil Procedure ("CCP") § 996.360(a).) Thus, cancellation and release of liability are separate and distinct issues and it is clear in the record that there was no notice of a request for a release of Ranger's liability under the bond.[3]

B. The Cancellation Of The Bond And Release Of Liability Were Not Within The Bankruptcy Court's Core Jurisdiction.

Ranger's second argument for denial of the petition focuses on the purported "core" jurisdiction of the bankruptcy

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[3] Of course, Ranger also asserts that the bankruptcy court is not required to follow state law. (Opp. 18.) Such an argument is completely contrary to the most elementary notions of bankruptcy jurisprudence. *See, Butner v. United States*, 440 U.S. 48, 99 S.Ct. 914, 918 (1979). (Property interests are created and defined by state law and should not be analyzed differently in a bankruptcy proceeding unless mandated by Congressional command or an identifiable federal interest.) While the bond was not property of the bankruptcy estate (*See Matter of Lockard*, 884 F.2d 1171, 1178 (9th Cir. 1989)), Ateeq had a property interest in the bond as its beneficiary (Opp. 7) and was entitled to application of state law in connection with the bond issues.

court to cancel the bond, an issue never addressed by the Ninth Circuit in its Memorandum. Ranger artificially attempts to conjure up core jurisdiction over cancellation of the bond and release of liability through two contentions. Neither is correct nor supports denial of the petition. First, Ranger argues that the turnover motion and bond cancellation are "inextricably linked." However, there was no such inextricable link. Nothing in the record supports Ranger's contention that the loss of its security mandated the cancellation of the bond. Ranger's frequent statements to the contrary do not make it true.

Second, Ranger argues that the bankruptcy court had core jurisdiction to cancel the bond because Ranger held collateral for the bond. Ranger can cite no case law nor offer any cogent analysis to support its argument that a motion involving collateral which is *not* property of the estate magically confers core jurisdiction on a bankruptcy court to cancel a bond filed in a state court action when the bond is already the subject of the jurisdiction of a state court.[4]

In arguing that the bankruptcy court had core jurisdiction under 28 U.S.C. § 157 to cancel the bond, Ranger completely ignores the literal requirements of § 157, which

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[4] Ranger cannot dispute Ateeq's showing that the bond was not property of the estate, that the proceeds of the letter of credit were not property of the estate and that Ranger lacked a valid and duly perfected deed of trust against real property of the estate. Moreover, the deed of trust itself was not property of the estate; it was the underlying real property which was property of the estate. Instead, Ranger can only argue that any *collateral* pledged as security for the *letter of credit* was property of the estate. However, Ranger cannot point to any such collateral. The schedules filed under penalty of perjury by Najor do not list any debt to First Western Bank, the bank issuing the letter of credit and do not disclose that First Western Bank had any interest in property of the estate.

must be read in conjunction with 28 U.S.C. § 1334. In fact, Ranger's only defense to Ateeq's showing that the cancellation of the bond did *not* arise under title 11 nor arise in a case under title 11, because cancellation of the bond was not based on any right expressly created by title 11 and procedures surrounding the bond have an existence outside of bankruptcy, is to claim this "begs the issue." (Opp. 16.). However, that is the test for determining whether core jurisdiction exists. *See, In re Eastport Associates,* 935 F.2d 1071, 1076 (9th Cir. 1991).

1. The Request For Cancellation Of The Bond And Release Of Liability Did Not Arise Under Title 11 Or Arise In A Case Under Title 11.

RANGER's primary argument for core jurisdiction is that it held collateral for the bond. However, the express language of section 157(b)(1) only authorizes bankruptcy judges to hear and determine "core proceedings arising under title 11 or arising in a case under title 11."

Najor's Notice of Motion and Motion for Turnover made two separate requests: (1) for turnover of collateral supporting the bond; and (2) for cancellation of the bond. All claims filed in bankruptcy court "must be able to stand on their own as either core or related proceedings." *In re Guild and Gallery Plus, Inc.*, 72 F.3d 1171, 1182 (3d Cir. 1996). Thus, the two separate requests must independently fall within the bankruptcy court's core jurisdiction.

The Ninth Circuit recognized this in its Memorandum (Pet. App. A1-A5) by holding:

> Because turnover is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(E), we need

> *only address whether the bankruptcy court had jurisdiction to order cancellation of the appeal bond.* (Emphasis added.) (Pet. App.A2.)

Clearly, the mere fact that Najor filed a turnover motion is not sufficient to confer core jurisdiction over the separate cancellation issue. Under a separate analysis, it is clear the cancellation issue did not fall within the bankruptcy court's core jurisdiction.

The phrase "arising under title 11" describes only those proceedings that involve a cause of action "created or determined" by statutory provisions of title 11. *In re Leco Enterprises, Inc.*, 144 B.R. 244, 248 (S.D.N.Y. 1992). "Arising in" proceedings are those that are not based on any right expressly created by title 11, but nevertheless, would have *no* existence outside of the bankruptcy. *Eastport Associates*, 935 F.2d at 1076.

The cancellation of the bond does not invoke a substantive right provided by title 11. Nor is cancellation of the bond a proceeding that, by its nature, could arise *only* in the context of a bankruptcy case. The bond was created pursuant to state law, was filed in a state court action, was subject to the jurisdiction of the state court, and had an existence independent of the bankruptcy. But for Najor's bankruptcy case, any cancellation of the bond would have been heard in state court. A request for cancellation of a state court bond filed in a state court action is a traditional state court type of action which does not arise under title 11 or arise in a case under title 11. Accordingly, notwithstanding that the cancellation of the bond was sought at the same time as the turnover, the cancellation of the bond was not subject to the bankruptcy court's core jurisdiction.

Ranger seeks to overcome the clear showing that the

bond issues did not arise under title 11 or arise in a case under title 11 by asserting the so-called "inextricable link" between the turnover and bond cancellation. However, even if there were such a link, it would not be sufficient to confer core jurisdiction with the bankruptcy court. *See, In re Bennett*, 154 B.R. 126, 135 (Bankr. N.D.N.Y. 1992) (Non core proceedings do not become core solely by virtue of the fact that they purport to arise out of the same occurrence as core proceedings.) *See also, In re DeLorean Motor Co.*, 155 B.R. 521, 525 (9th Cir. BAP 1993). (A proceeding will *not* be considered core, even if it falls within the literal language of §157(b)(2)(A), if it is a state law claim that *could exist outside* of bankruptcy and is not inextricably bound to a right created by the Bankruptcy Code.) Clearly the bond had an existence outside of bankruptcy and was a creature of state law, dependent upon state law both for its existence and its termination. Core jurisdiction did not exist in this case over the bond cancellation issue.

C. Ateeq Did Not Expressly Consent To The Bankruptcy Court's Exercise Of Full Adjudicatory Jurisdiction.

Ranger's third argument for denial of the petition is that Ateeq expressly consented to the bankruptcy court's "non-core, related to" jurisdiction. Ranger makes two contentions in support of the bankruptcy court's exercise of "related to" jurisdiction. First, that this Court already held in *Celotex Corp. v. Edwards*, 514 U.S. 300, 115 S.Ct. 1493 (1995) that "Bankruptcy Court jurisdiction is 'at least' non-core." (Opp. 6.) Second, that Ateeq expressly consented to jurisdiction by approving the order canceling the bond "as to form." (Opp. 21.) Both contentions are flawed.

After arguing to the bankruptcy court and submitting a specific finding adopted by the bankruptcy court that the ruling in *Celotex* does *not* apply in this case (Pet. App. B5), Ranger now relies on *Celotex* for a finding of related to jurisdiction, calling it a "directly" and "strongly analogous case." However, in *Celotex*, there was a specific finding that over 141,000 asbestos-related bodily injury lawsuits were pending and over 100 such cases were in some stage of appeal with judgments totaling nearly $70 million being stayed by bonds. *Id.* at 1496 n. 2. If payments were made under the bonds resulting in the sureties enforcement of their rights to collateral, such actions would jeopardize and possibly destroy any chance of successful reorganization. *Id.* at 1497 n. 4. Here, there was no finding and can be no finding that payment by Ranger under the one bond to the one bonded creditor would have jeopardized reorganization or effected Najor's bankruptcy estate. Najor's schedules listed almost $28 million in assets against almost $9 million in liabilities. Additionally, the lower courts in *Celotex* took great care to protect the bonded judgment creditors. *Id.* at 1497 n. 4. Here, Ateeq's bond protection was completely destroyed. If anything, *Celotex* supports the proposition that the bankruptcy court could not do what it did in this case.

However, even if "non-core, related to" jurisdiction was present, Ateeq did not expressly consent to such jurisdiction as required to avoid constitutional infirmities.

Ranger contends that Ateeq expressly consented to jurisdiction by approving the order canceling the bond "as to form." (Opp. 21.) Approving the "form" of an order is an insufficient manifestation of express consent to the exercise of "non-core, related to" jurisdiction.

In *In re Daniels-Head & Associates*, 819 F.2d 914, 918 (9th Cir. 1987), the Ninth Circuit stated that "Congress

apparently modeled section 157(c)(2) after section 636" of the United States Magistrates Act. That Act allows parties to consent to a magistrate's jurisdiction to make final determinations in civil matters. (28 U.S.C. § 636(c).) In *Daniels-Head*, the Ninth Circuit concluded that because the Bankruptcy Code, on its face, did not require explicit consent to jurisdiction, as did the Magistrates Act, the failure to object to jurisdiction constitutes consent to jurisdiction. *Id.* at 919. However, the Bankruptcy Rules were amended in 1986 requiring express written consent to the exercise of non-core jurisdiction.

The Ninth Circuit recently addressed the express consent requirements of 28 U.S.C. § 636(c). In *In re Marriage of Nasca*, 160 F.3d 578 (9th Cir. 1998), the Ninth Circuit concluded that "consent may not be inferred from the conduct of the parties." *Id.* at 579. The Ninth Circuit recognized that unless there was a "clear and unambiguous expression of consent," the "grant of judicial power to magistrates would infringe on the constitutional rights guaranteed to litigants by Article III" of the Constitution. *Id.* Congress has recognized this constitutional difficulty in connection with bankruptcy jurisdiction by amending the Bankruptcy Rules to require express consent to the full exercise of "non-core, related to" jurisdiction by a non-Articles III bankruptcy judge.

This Court should likewise require that consent to a bankruptcy court's exercise of full adjudicatory jurisdiction in a "non-core, related to" matter be explicit, clear, unambiguous, and not inferred from the conduct of the parties. Thus, even if "approving an order as to form" could somehow be interpreted as an expression of consent to jurisdiction, which it is not, instead of merely an acknowledgment that the written order is in the proper form,

it falls well short of a "clear and unambiguous expression of consent" to the exercise of jurisdiction as required to avoid constitutional problems.

III. CONCLUSION

The Ninth Circuit ignored the requirement for express consent by all parties before a bankruptcy judge may constitutionally hear and determine a matter subject to its "non-core, related to" jurisdiction. In order to avoid infringing on the constitutional rights guaranteed to litigants by Article III of the Constitution, the consent required by 28 U.S.C. § 157(c)(2) must be explicit, clear, unambiguous and not inferred from the conduct of the parties.

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: December 22, 1998

Respectfully submitted,

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